No. 14-723

In the Supreme Court of the United States

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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July 6, 2015

Petition for Writ of Certiorari filed December 16, 2014
Petition for Writ of Certiorari granted March 30, 2015

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Appendix A Opinion of the United States Court of Appeals for the Eleventh Circuit (November 25, 2014) App. 1

Appendix B Order on Cross-Motions for Summary Judgment (March 17, 2014) App. 19

Appendix C Opinion of the United States Court of Appeals for the Eleventh Circuit (*AirTran*) (September 23, 2014) App. 46

Appendix D On Petition(s) for Rehearing And Petition(s) for Rehearing En Banc (*AirTran*)
(December 2, 2014) App. 77

RELEVANT DOCKET ENTRIES

United States District Court for the Southern District of Florida (West Palm Beach)

9:12-cv-80746-DLB

Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile

Date Filed	#	Docket Text
07/11/2012	1	COMPLAINT against Board of Trustees of the National Elevator Industry Health Benefit Plan. Filing fee $ 350.00 receipt number 113C-4884807, filed by Board of Trustees of the National Elevator Industry Health Benefit Plan. (Attachments: # 1 Exhibit A, # 2 Civil Cover Sheet, # 3 Summon(s))(Kolb, John) (Entered: 07/11/2012) (Entered: 07/11/2012)
07/11/2012	2	Judge Assignment to Judge Donald M. Middlebrooks (vjk) (Entered: 07/11/2012)
07/11/2012	3	Summons Issued as to Robert Montanile. (vjk) (Entered: 07/11/2012)
07/25/2012	4	ORDER REFERRING CASE and Setting Trial Date; referring to Magistrate Judge Dave Lee Brannon for Pretrial Proceedings, (Calendar Call set for 3/6/2013 01:15 PM before Judge Donald M. Middlebrooks., Jury Trial set for

		3/11/2013 09:00 AM before Judge Donald M. Middlebrooks., Status Conference set for 3/6/2013 01:15 PM before Judge Donald M. Middlebrooks.) Signed by Judge Donald M. Middlebrooks on 7/25/12. (mg) (Entered: 07/25/2012)
08/01/2012	5	ORDER SETTING TELEPHONIC SCHEDULING CONFERENCE, (Telephone Conference set for 8/16/2012 at 11:00 AM in West Palm Beach Division before Magistrate Judge Dave Lee Brannon.) Signed by Magistrate Judge Dave Lee Brannon on 8/1/2012. (sa) (Entered: 08/01/2012)
08/16/2012	6	Minute Entry for proceedings held before Magistrate Judge Dave Lee Brannon: Telephone Conference held on 8/16/2012. (Digital 11:06:30.) (sa) (Entered: 08/16/2012)
08/16/2012	7	PRETRIAL SCHEDULING ORDER: Amended Pleadings due by 9/10/2012. Discovery due by 12/3/2012. Joinder of Parties due by 9/10/2012. Motions due by 12/17/2012. Pretrial Stipulation due by 2/11/2013. Signed by Magistrate Judge Dave Lee Brannon on 8/16/2012. (sa) (Entered: 08/16/2012)

08/16/2012	8	ORDER REFERRING CASE to Mediation. Signed by Magistrate Judge Dave Lee Brannon on 8/16/2012. (sa) (Entered: 08/16/2012)
09/06/2012	9	MOTION for Extension of Time to File Answer RE: Complaints re 1 Complaint, *to 9/18/2012* by Robert Montanile. (Tucker, John) (Entered: 09/06/2012)
09/14/2012	10	ORDER granting 9 Stipulated Motion for Extension of Time to Answer RE: Complaints re 1 Complaint, Robert Montanile answer due 9/18/2012. Signed by Judge Donald M. Middlebrooks on 9/14/2012. (ls) (Entered: 09/14/2012)
09/17/2012	11	ANSWER and Affirmative Defenses to Complaint by Robert Montanile.(Tucker, John) (Entered: 09/17/2012)
10/09/2012	12	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Brian S. King. Filing Fee $ 75.00. Receipt # 46503. (ksa) (Entered: 10/11/2012)
10/11/2012	13	ORDER denying 12 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing of Attorney Brian S. King Notice of

		Termination delivered by US Mail to Brian King. Signed by Judge Donald M. Middlebrooks on 10/11/2012. (ls) (Entered: 10/11/2012)
12/18/2012		Attorney Brian S. King representing Montanile, Robert (Defendant) Activated. (cw) (Entered: 12/18/2012)
12/18/2012	14	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Brian S. King. Filing Fee $ 75.00. Receipt # 46530. (ksa) (Entered: 12/18/2012)
12/19/2012	15	ORDER denying 14 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing of Attorney Brian S. King Notice of Termination delivered by US Mail to Brian King. Signed by Judge Donald M. Middlebrooks on 12/19/2012. (ls) (Entered: 12/19/2012)
12/28/2012	16	NOTICE of Compliance re: Certification of Brian S. King by Robert Montanile re 15 Order on Motion to Appear Pro Hac Vice, (yha) (Entered: 12/31/2012)
01/03/2013	17	NOTICE by Robert Montanile *to Receive Electronic Notification for Brian S. King* (Tucker, John)

		(Entered: 01/03/2013)
01/23/2013	18	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Brian S. King. (ksa) (Entered: 01/25/2013)
01/30/2013	19	ORDER granting 18 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Judge Donald M. Middlebrooks on 1/30/2013. (ls) (Entered: 01/30/2013)
02/01/2013	20	*ORDER REQUIRING STATUS REPORT Signed by Judge Donald M. Middlebrooks on 2/1/2013. (sw) (Entered: 02/01/2013)
02/05/2013	21	ORDER Requiring Status Report, (Status Report due by 5PM on 2/5/2013.) Signed by Judge Donald M. Middlebrooks on 2/4/2013. (ls) (Entered: 02/05/2013)
02/05/2013	22	STATUS REPORT by Board of Trustees of the National Elevator Industry Health Benefit Plan (Kolb, John) (Entered: 02/05/2013)
02/07/2013	23	ORDER re 22 Status Report filed by Board of Trustees of the National Elevator Industry Health Benefit Plan. Signed by Judge Donald M. Middlebrooks on 2/6/2013. (ls) (Entered:

		02/07/2013)
02/08/2013	24	CONSENT to Jurisdiction by US Magistrate Judge by Board of Trustees of the National Elevator Industry Health Benefit Plan, Robert Montanile (Kolb, John) (Entered: 02/08/2013)
02/11/2013	25	ORDER REFERRING CASE to Magistrate Judge Dave Lee Brannon for Trial. Judge Donald M. Middlebrooks no longer assigned as presider/referral judge(s) in case. Signed by Judge Donald M. Middlebrooks on 2/11/2013. (ls) (Entered: 02/12/2013)
02/12/2013	26	ORDER SETTING TELEPHONIC STATUS CONFERENCE, (Telephonic Status Conference set for 2/15/2013 at 1:00 PM in West Palm Beach Division before Magistrate Judge Dave Lee Brannon.) Signed by Magistrate Judge Dave Lee Brannon on 2/12/2013. (sa) (Entered: 02/12/2013)
02/15/2013	27	Minute Entry for proceedings held before Magistrate Judge Dave Lee Brannon: Status Conference held on 2/15/2013. (Digital 14:00:14.) (sa) (Entered: 02/15/2013)
02/20/2013	28	MOTION for Entry of Briefing Schedule by Robert Montanile.

		(Tucker, John) Modified Text on 2/21/2013 (ls). (Entered: 02/20/2013)
02/21/2013	29	ORDER SETTING TRIAL BEFEORE MAGISTRATE JUDGE AND AMENDED PRETRIAL SCHEDULING ORDER. Granting in Part and Denying In Part 28 MOTION for Entry of Briefing Schedule. (1-Day Bench Trial set for 8/13/2013 at 9:30 AM in West Palm Beach Division before Magistrate Judge Dave Lee Brannon., Status Conference set for 8/7/2013 at 1:30 PM in West Palm Beach Division before Magistrate Judge Dave Lee Brannon.), Motion terminated: 28 MOTION for Entry of Briefing Schedule filed by Robert Montanile. Signed by Magistrate Judge Dave Lee Brannon on 2/21/2013. (sa) (Entered: 02/21/2013)
02/22/2013		Set/Reset Scheduling Order Deadlines pursuant to DE# 29: Mediation Deadline 6/14/2013. Dispositive Motions due by 4/15/2013. Pretrial Stipulation due by 7/15/2013. (dgj) (Entered: 02/22/2013)
03/25/2013	30	ORDER SCHEDULING SETTLEMENT CONFERENCE: Settlement Conference set for

		6/6/2013 at 10:00 AM in West Palm Beach Division before Magistrate Judge William Matthewman. Signed by Magistrate Judge William Matthewman on 3/25/2013. (kza) (Entered: 03/25/2013)
06/06/2013	31	Minute Entry for proceedings held before Magistrate Judge William Matthewman: Settlement Conference held on 6/6/2013. Case did not settle. (Digital 10:06:04--10:16:14.) (nbt) (Entered: 06/06/2013)
07/09/2013	32	MOTION to Strike *Trial Date* by Robert Montanile. Responses due by 7/26/2013 (Tucker, John). Added MOTION for Entry of Briefing Schedule on 7/10/2013 (ls). (Entered: 07/09/2013)
07/10/2013	33	Clerks Notice to Filer re 32 MOTION to Strike *Trial Date and for Entry of Briefing Schedule*. **Motion with Multiple Reliefs Filed as One Relief**; ERROR - The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual.

		(ls) (Entered: 07/10/2013)
07/22/2013	34	ORDER Granting 32 MOTION to Strike *Trial Date* MOTION for Entry of Briefing Schedule filed by Robert Montanile and removing Trial from calendar and Establishing Summary Judgment Briefing Schedule. (Motion for Summary Judgment due by 8/27/2013., Responses due by 9/24/2013, Replies due by 10/9/2013.) Signed by Magistrate Judge Dave Lee Brannon on 7/22/2013. (sa) (Entered: 07/22/2013)
08/27/2013	35	MOTION for Summary Judgment by Robert Montanile. Responses due by 9/13/2013 (Attachments: # 1 Affidavit Notice of Filing Declaration, # 2 Affidavit Declaration of Brian S. King, # 3 Exhibit Exhibit A(1), # 4 Exhibit Exhibit A(2), # 5 Exhibit Exhibit B(1), # 6 Exhibit Exhibit B(2), # 7 Exhibit Exhibit B(3), # 8 Exhibit Exhibit C(1), # 9 Exhibit Exhibit C(2))(Tucker, John) (Entered: 08/27/2013)
08/27/2013	36	MOTION for Summary Judgment by Board of Trustees of the National Elevator Industry Health Benefit Plan. Responses due by 9/13/2013 (Attachments: # 1 Affidavit of John McGowan, # 2 Affidavit Exhibit A, # 3 Affidavit

		Exhibit B-1, # 4 Affidavit Exhibit B-2, # 5 Affidavit Exhibit C)(Kolb, John) (Entered: 08/27/2013)
08/28/2013	37	Clerks Notice to Filer re 35 MOTION for Summary Judgment. Docket Text Does Not Match Document; ERROR - The Filer failed to enter a title in the docket text that matches the title of the document. It is not necessary to refile the document. (ls) (Entered: 08/28/2013)
09/13/2013	38	RESPONSE in Opposition re 35 MOTION for Summary Judgment filed by Board of Trustees of the National Elevator Industry Health Benefit Plan. (Kolb, John) (Entered: 09/13/2013)
09/25/2013	39	RESPONSE in Opposition re 36 MOTION for Summary Judgment filed by Robert Montanile. (Attachments: # 1 Certification Certificate of Service, # 2 Affidavit Declaration, # 3 Affidavit Declaration)(Tucker, John) (Entered: 09/25/2013)
10/09/2013	40	MEMORANDUM in Support re 35 MOTION for Summary Judgment by Robert Montanile. (Tucker, John) (Entered: 10/09/2013)
10/09/2013	41	REPLY to Response to Motion re 36 MOTION for Summary Judgment filed by Board of Trustees of the National Elevator

		Industry Health Benefit Plan. (Attachments: # 1 Affidavit Supplement Affidavit of John McGowan, # 2 Affidavit Exhibit A to Supplemental Affidavit of John McGowan) (Kolb, John) (Entered: 10/09/2013)
10/09/2013	42	REPLY to Response to Motion re 35 MOTION for Summary Judgment filed by Robert Montanile. (ls) (See Image at DE # 40) (Entered: 10/10/2013)
10/10/2013	43	Clerks Notice to Filer re 40 Memorandum. **Wrong Event Selected**; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#42]. It is not necessary to refile this document. (ls) (Entered: 10/10/2013)
11/20/2013	44	Notice of Supplemental Authority re 35 MOTION for Summary Judgment by Robert Montanile (Tucker, John) (Entered: 11/20/2013)
03/17/2014	45	ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT. Denying 35 Defendant's Motion for Summary Judgment; Granting 36 Plaintiff's Motion for Summary Judgment. Signed by Magistrate Judge Dave Lee Brannon on 3/17/2014. (sa) (Entered: 03/18/2014)

03/17/2014	46	FINAL JUDGMENT in favor of Board of Trustees of the National Elevator Industry Health Benefit Plan against Robert Montanile. Clerk shall close case and deny all pending motions as moot. Signed by Magistrate Judge Dave Lee Brannon on 3/17/2014. (sa) (Entered: 03/18/2014)
04/16/2014	47	NOTICE by Robert Montanile *Notice of Appeal* (Tucker, John) (Entered: 04/16/2014)
04/16/2014	48	Notice of Appeal (See de# 47 for image) by Robert Montanile as to 46 Judgment, 45 Order on Motion for Summary Judgment. Filing fee $(NOT PAID). Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (mc) (Entered: 04/17/2014)
04/17/2014	49	Clerks Notice to Filer re 47 Notice (Other). **Wrong Event Selected**; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see de# 48. It is not necessary to refile this document. (mc) (Entered: 04/17/2014)

04/17/2014		Transmission of Notice of Appeal, Order, Final Judgment and Docket Sheet to US Court of Appeals re 48 Notice of Appeal. Notice has been electronically mailed. (mc) (Entered: 04/17/2014)
04/22/2014	50	Acknowledgment of Receipt of NOA from USCA re 48 Notice of Appeal, filed by Robert Montanile. Date received by USCA: 4/17/2014. USCA Case Number: 14-11678-C. (mc) (Entered: 04/22/2014)
04/30/2014	51	TRANSCRIPT INFORMATION FORM by Robert Montanile re 48 Notice of Appeal,. No Transcript Requested. (Tucker, John) (Entered: 04/30/2014)
05/02/2014	52	USCA Appeal Fees received on 5/2/2014 in the amount of $505.00 receipt number FLS00003013 re 48 Notice of Appeal, filed by Robert Montanile (mc) (Entered: 05/02/2014)
07/01/2014	53	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Southern District of Florida certifies that the record is complete for purposes of this appeal re: 48 Notice of Appeal, Appeal No. 14-11678-CC. The entire record on appeal is available electronically. (mc) (Entered: 07/01/2014)

01/02/2015	54	MANDATE of USCA (certified copy) AFFIRM Judgment/ Order of the district court with courts opinion re 48 Notice of Appeal, filed by Robert Montanile; Date Issued: 1/2/2015; USCA Case Number: 14-11678-CC (amb) (Entered: 01/05/2015)
04/03/2015	55	WRIT OF CERTIORARI DENIED [sic] by US Supreme Court. The court's mandate having previously issued, no further action will be taken by this court; re 48 Notice of Appeal, filed by Robert Montanile. USCA# 14-11678-CC (mc) (Entered: 04/03/2015)

United States Court of Appeals
for the Eleventh Circuit

14-11678

Board of Trustees Natl. Elev. v.
Robert Montanile

04/17/2014 CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Robert Montanile on 04/16/2014. Fee Status: Fee Not Paid.

04/30/2014 APPEARANCE of Counsel Form filed by Victor O'Connell for Appellant (ECF: Victor O'Connell)

04/30/2014 Added Attorney(s) Victor O'Connell for party(s) Appellant Robert Montanile, in case 14-11678.

04/30/2014 TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Victor O'Connell for Appellant Robert Montanile. No hearings. (ECF: Victor O'Connell)

05/01/2014 TRANSCRIPT INFORMATION form filed by Attorney Victor O'Connell for Appellant Robert Montanile. No hearings.

05/02/2014 Appellate fee was paid on 05/02/2014 as to Appellant Robert Montanile.

05/06/2014 APPEARANCE of Counsel Form filed by Peter K. Stris for Appellant (ECF: Peter Stris)

05/06/2014 Civil Appeal Statement filed by Attorney

Victor O'Connell for Appellant Robert Montanile. (ECF: Victor O'Connell)

05/06/2014 Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Robert Montanile. (ECF: Victor O'Connell)

05/08/2014 Briefing Notice issued to Appellant Robert Montanile. The appellants brief is due on or before 05/27/2014. The appendix is due on or before 06/03/2014.

05/08/2014 Added Attorney(s) Peter K. Stris for party(s) Appellant Robert Montanile, in case 14-11678.

05/27/2014 Appellant's brief filed by Robert Montanile. (ECF: Peter Stris)

05/28/2014 Received paper copies of EBrief filed by Appellant Robert Montanile.

05/29/2014 Appendix filed [2 VOLUMES] by Appellant Robert Montanile. (ECF: Peter Stris)

06/02/2014 Received paper copies of EAppendix filed by Appellant Robert Montanile. 2 VOLUMES 2 SETS

06/30/2014 APPEARANCE of Counsel Form filed by John David Kolb for Board of Trustees of the National Elevator Industry Health Benefit Plan. (ECF: John Kolb)

06/30/2014 Appellee's Brief filed by Appellee Board of

Trustees of the National Elevator Industry Health Benefit Plan. (ECF: John Kolb)

06/30/2014 E-filed Appearance of Counsel processed for Attorney John David Kolb for Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan in 14-11678.

06/30/2014 Corrected brief received on 07/02/2014 from Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan. 7 copies received. All deficiencies have been corrected.

07/01/2014 Notice of deficient Appellee brief filed by Attorney John David Kolb for Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan. Deficiencies: missing oral argument statement.

07/01/2014 Received paper copies of EBrief filed by Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan.

07/01/2014 Corrected Appellee's Brief filed by Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan. (ECF: John Kolb)

07/17/2014 Reply Brief filed by Appellant Robert Montanile. (ECF: Peter Stris)

07/21/2014 Received paper copies of EBrief filed by Appellant Robert Montanile.

07/25/2014 The Court has determined that oral argument will be necessary in this case. Please forward 3 additional copies of the 2 volumes of Appendix filed 5/29/14 by Attorney Peter K. Stris for Appellant Robert Montanile to the Clerk's Office, Attention: Jenifer Tubbs. Your prompt attention to this matter is appreciated.

07/29/2014 Additional copies of Appendix received from Peter K. Stris for Robert Montanile and forwarded to the record room.

08/11/2014 Assigned to tentative calendar number 5 in Montgomery during the week of November 17, 2014.

09/11/2014 Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney John David Kolb for Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: John Kolb)

09/23/2014 Calendar issued as to cases to be orally argued the week of 11/17/2014 in Montgomery, Alabama. Counsel are

directed to electronically acknowledge receipt of this calendar by docketing the Calendar Receipt Acknowledged event in ECF. Counsel must be logged into CM/ECF in order to view the attached calendar.

09/23/2014 Oral argument scheduled. Argument Date: Friday, 11/21/2014 Argument Location: Montgomery, AL.

09/25/2014 Public Communication: E-mail to Appellant and Appellee from the court.

09/26/2014 Attorney Peter K. Stris for Appellant Robert Montanile hereby acknowledges receipt of a copy of the printed calendar for 11/17/2014. Peter K. Stris, Tel: (424) 212-7090, will present argument. (ECF: Peter Stris)

09/29/2014 Attorney John David Kolb for Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan hereby acknowledges receipt of a copy of the printed calendar for 11/21/2014. John D. Kolb, 502.214.6125 will present argument. (ECF: John Kolb)

10/06/2014 Supplemental Appellant's Letter Brief filed by Appellant Robert Montanile. (ECF: Peter Stris)

10/14/2014 Supplemental Appellee's Letter Brief filed by Appellee Board of Trustees of the National Elevator Industry Health

	Benefit Plan. (ECF: John Kolb)
11/21/2014	Oral argument held. Oral Argument participants were Peter K. Stris for Appellant Robert Montanile and John David Kolb for Appellee Board of Trustees of the National Elevator Industry Health Benefit Plan.
11/25/2014	Judgment entered as to Appellant Robert Montanile.
11/25/2014	Opinion issued by court as to Appellant Robert Montanile. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Signed.
12/01/2014	Oral argument CD requested by Kristina Kourasis.
12/19/2014	Notice of Writ of Certiorari filed as to Appellant Robert Montanile. SC# 14-723.
01/02/2015	Mandate issued as to Appellant Robert Montanile.
01/29/2015	Checked status of certiorari 14-723 filed as to Appellant Robert Montanile Pending.
03/24/2015	Checked status of certiorari 14-723 filed as to Appellant Robert Montanile Pending.
03/30/2015	Writ of Certiorari filed as to Appellant Robert Montanile is GRANTED. SC# 14-723.--[Edited 04/03/2015 by JC]

04/03/2015	Public Communication: The attorneys and Judge Brannon are being notified that the docket has been corrected to reflect that the U.S. Supreme Court has granted the petition for writ of certiorari.
05/06/2015	Checked status of certiorari 14-723 filed as to Appellant Robert Montanile Pending.
06/08/2015	Checked status of certiorari 14-723 filed as to Appellant Robert Montanile Pending.

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 12-cv-80746
Middlebrooks/Brannon

[Filed August 27, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,	)
Plaintiff,	)
v.	)
ROBERT MONTANILE,	)
Defendant.	)

[ECF No. 35]

DEFENDANT ROBERT MONTANILE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Defendant Robert Montanile ("Montanile"), through his undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, submits the following Memorandum of Points and Authorities in Support of his Motion for Summary Judgment in the above captioned matter.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pre-Litigation Factual Background

1. In 2008, Montanile was a participant in the National Elevator Industry Health Benefit Plan ("the Plan"). Plaintiff's Complaint, docket entry #1, ¶ 8; Defendant's Answer, docket entry #11, ¶ 8.

2. On December 1, 2008, Montanile was involved in an automobile accident in which he suffered serious injuries. Plaintiff's Complaint, docket entry #1, ¶ 9; Defendant's Answer, docket entry #11, ¶ 9.

3. The Plan provided coverage for some of Montanile's medical treatment following the accident in the amount of $121,044.02. Plaintiff's Complaint, docket entry #1, ¶ 10; Defendant's Answer, docket entry #11, ¶ 10.

4. Montanile subsequently pursued a negligence claim against the driver of the other vehicle involved in the accident. Montanile also filed an underinsured motorist claim with his own automobile insurer. Plaintiff's Complaint, docket entry #1, ¶ 13; Defendant's Answer, docket entry #11, ¶ 13.

5. Montanile settled both the negligence and underinsured claims. Plaintiff's Complaint, docket entry #1, ¶ 14; Defendant's Answer, docket entry #11, ¶ 14.

6. Montanile retained Brian S. King, Esq. ("King") to assist him in addressing the Plan's claim for reimbursement. Declaration of Brian S. King ("King Dec."), ¶ 3.

7. Thereafter King and counsel for the Plan, Kejo Bryan-Carby, exchanged a series of letters in which King requested information and documents to verify the validity of the subrogation claim. King Dec., ¶4

8. King requested all documents under which the Plan was established and operated, the Summary Plan Description ("SPD"), and all other documents outlining the rights and obligations of the parties. King Dec., ¶5.

9. Eventually the Plan sent to King various documents including the National Elevator Bargaining Association Agreement with International Union of Elevator Constructors, the Restated Agreement and Declaration of Trust National Elevator Industry Welfare Plan, and the SPD. King Dec., ¶6. These documents are attached as Exhibits A, B, and C to the King Dec.

10. King wrote Ms. Bryan-Carby on November 30, 2011, informed her that he did not believe the governing plan documents provided the Plan with any subrogation rights and asked that she produce a governing plan document containing language that entitled the Plan to assert its subrogation claim. King Dec. ¶¶7-8.

11. King indicated that if the Plan did not respond by December 14, 2011, he intended to disburse the settlement funds to Montanile. King Dec. ¶8.

12. The Plan responded on December 12, 2011, and maintained its position that the SPD, which contains subrogation language for the Plan, was the governing plan document. The Plan provided an

amount for which it was willing to settle the case. King Dec. ¶9.

13. King responded on December 13, 2011, reiterated Montanile's position that the Plan was not entitled to any subrogation recovery because the SPD language was not based on any governing plan document language, and rejected the Plan's offer of settlement. He provided a counteroffer to resolve the matter. King Dec. ¶10.

14. The Plan rejected Montanile's counteroffer and provided a final counteroffer of its own. The Plan stated that failure to accept its final offer would result in litigation. King Dec., ¶11.

15. On January 6, 2012, King wrote and requested that if the Plan intended to litigate the matter, it do so within 14 days. He stated that he would release the funds to Montanile if he had not been served with the Plan's Complaint by January 20, 2012. King Dec., ¶12.

16. The Plan did not respond to the letter and King's office disbursed the funds to Montanile on February 2, 2012. King Dec., ¶13.

17. The Plan did not file suit until July 11, 2012. Complaint, docket entry #1.

18. Montanile has paid and incurred obligations to pay King on an hourly basis for King's legal services. King Dec., ¶15.

19. Terms Relating To Subrogation In The Governing Plan Documents

20. The collective bargaining agreement attached as Exhibit A(1) and (2) to the King Dec., states in its first paragraph:

21. The Health Benefit Plan covering life insurance, sickness and accident benefits, and hospitalization insurance, or any changes thereto that are in accordance with the National Elevator Industry Health Benefit Plan and Declaration of Trust, shall be a part of this Agreement and adopted by all parties signatory thereto.

22. There is nothing in the collective bargaining agreement about any right to subrogation or reimbursement for the Plan from its participants.

23. The Restated Agreement and Declaration of Trust attached as Exhibit B(1), (2) and (3) to the King Dec., contains no language relating to any right of the Plan to obtain reimbursement or subrogation against its participants' third party recoveries.

OVERVIEW

The Board of Trustees of the National Elevator Industry Health Plan ("the Plan") relies on language in the Summary Plan Description ("SPD") to establish Montanile's obligation to reimburse the Plan for medical expenses it paid arising out of his workplace injury. It is undisputed that the only document containing any language giving the Plan the right to any subrogation or reimbursement claims against Montanile is the SPD. However, the only two documents that reflect the actual agreement between the management team for the employers and the employees' union representing Montanile are the National Elevator Bargaining Association Agreement

with International Union of Elevator Constructors ("Bargaining Association Agreement" attached as Exhibit A to the King Dec.) and the Restated Agreement and Declaration of Trust for the National Elevator Industry Welfare Plan ("Restated Agreement and Declaration of Trust" attached as Exhibit B to the King Dec.). Neither of these governing plan documents contain any language establishing any subrogation or reimbursement right on behalf of the Plan. Contrary to the Plan's argument, the SPD cannot create a right to subrogation or reimbursement to which the parties to the underlying agreement, management and the employees, have never agreed. Consequently, Montanile is entitled to this Court's entry of Summary Judgment in his favor and to an award of attorney fees and costs incurred in defending against the Plan's improper reimbursement claim.

ARGUMENT

I. THE GOVERNING PLAN DOCUMENTS DO NOT PROVIDE THE PLAN WITH ANY RIGHTS OF SUBROGATION OR REIMBURSEMENT

The Bargaining Association Agreement and the Restated Agreement and Declaration of Trust are the only documents that were negotiated between the employers and the employee union. Those documents establish the rights and obligations between the parties. They are silent about the subrogation and reimbursement rights for the Plan. ERISA requires that each employee welfare benefit plan sponsor prepare a summary of the benefits for ERISA plan participants and beneficiaries. 29 U.S.C. §1021. This SPD is required to contain the material outlined in 29

U.S.C. §1022 and to be furnished to ERISA plan participants. 29 U.S.C. §1024. But, by definition, the SPD is a summary of other governing plan documents. The Plan may not create subrogation and reimbursement rights out of thin air, unilaterally place them in the SPD, and insist that this Court enforce those rights.

Two years ago, in Cigna Corp. v. Amara, 131 S.Ct. 1866 (2011), the Supreme Court discussed at some length the relationship between documents that establish the rights and obligations of the parties to an ERISA plan and the SPD. The Court made clear that SPDs are not terms of an ERISA Plan. Amara, 131 S.Ct. at 1877. ". [T]he summary documents, important as they are, provide communication with beneficiaries *about* the plan, but their statements do not themselves constitute the *terms* of the plan for purposes of §502(a)(1)(B) [29 U.S.C. §1132(a)(1)(B)]." Amara, 131 S.Ct. at 1878 (emphasis in original). If there is inconsistency between the terms of the SPD and the terms of the documents that establish the rights and obligations between the parties and govern their relationship, the SPD must yield. Id.

In this case, the Plan's reimbursement claim is brought under 29 U.S.C. §1132(a)(3) rather than §1132(a)(1)(B). But this makes no difference. Under 29 U.S.C. §1132(a)(3) the Plan is entitled to obtain only "appropriate equitable relief to enforce the terms of the plan." The Supreme Court has made clear that, based on this statutory language, any claim for reimbursement or subrogation is both equitable in nature and must be based on the terms of the ERISA

plan. U.S. Airways v. McCutchen, 133 S.Ct. 1537 (2013).

In McCutchen an ERISA plan fiduciary brought a reimbursement claim against a plan participant based on clear language allowing for reimbursement found in the SPD in that case.[1] The Court made clear the language of 29 U.S.C. §1132(a)(3) requires the parties to live with the terms of the governing plan documents when evaluating the rights and obligations of the parties dealing with reimbursement claims. McCutchen, 133 S.Ct. at 1546 (equitable principles are "'beside the point' when parties demand what they bargained for in a valid agreement" (citing Sereboff v. Mid Atlantic Medical Services Inc., 547 U.S. 356 (2006)). Relying on 29 U.S.C. §1104(a)(1)(D), the Court pointed out that ERISA plans must be established and maintained pursuant to written documents and that ERISA fiduciaries must act in accordance with those documents: "[t]he plan, in short, is at the center of ERISA." McCutchen, 133 S.Ct. at 1548. And Amara makes clear that the SPD is an entirely separate

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[1] Only at the Supreme Court level of argument, in response to a request from the Solicitor General, did the Plan produce the governing plan document. The Supreme Court refused to consider the argument that the SPD language was not controlling in light of inconsistent language in the governing plan document only because the argument was raised too late in the process. "Because everyone in this case has treated the language from the summary description as though it came from the plan, we do so as well." McCutchen, 133 S.Ct. at 1543, n.1. This aspect of McCutchen highlights the importance of the governing plan documents, rather than the SPD, determining the rights and obligations of the parties with regard to reimbursement claims.

document from the agreement between the parties that constitutes "the plan."

The governing plan documents, the Bargaining Association Agreement and the Restated Agreement and Declaration of Trust, are the only contracts negotiated by the parties to the Plan. Neither make any reference to, or create any rights for, subrogation or reimbursement in the Plan. The language of the SPD may not stand alone. Montanile is entitled to Summary Judgment in his favor on the Plan's cause of action.

II. MONTANILE IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS UNDER 29 U.S.C. §1132(g)

In his Answer filed in this case Montanile requested an award of attorney fees and costs for the expenses incurred in defending against the Plan's action against him. The basis for his request is the language of 29 U.S.C. §1132(g)(1) which states that in an ERISA case the court, in its discretion, may allow a reasonable attorney fee and costs to either party. In Hardt v. Reliance Standard Life Ins. Co., 130 S.Ct. 2149 (2010), the Court interpreted this provision of ERISA as allowing an award of attorney fees and costs where a litigant realizes "some degree of success on the merits" in the litigation. Hardt, 130 S.Ct. at 2158. There can be little question that a ruling in Montanile's favor on summary judgment constitutes "some degree of success on the merits" of this case.

The Supreme Court also left open the option for federal courts to utilize the five factor test that was commonly employed for evaluating an award of

attorney fees under ERISA before Hardt was decided. The Eleventh Circuit version of that analysis initially was provided in McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566 (11th Cir. 1985) and has since been cited in many cases. The five factors are (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' position. McKnight, 758 F.2d at 1571-72. "In applying these criteria, courts should bear in mind ERISA's essential remedial purpose: to protect the beneficiaries of [ERISA] plans." Nachwalter v. Christie, 801 F.2d 956, 962 (11th Cir. 1986).

With regard to the first factor, given the complete absence of any language in the documents governing the parties and creating rights and obligations between them, Montanile believes the Plan is acting in a culpable manner in pursuing him for reimbursement. In addition, in light of his attempts to negotiate a resolution of this matter short of litigation and the Plan's delay in bringing suit until months after all the settlement money had been disbursed to Montanile, the actions of the Plan in pursuing Montanile may at least be labeled as culpable.

With regard to the second factor, there can be little question that the Plan has the capacity to satisfy an award of attorney fees in favor of Montanile. The same

cannot be said for any claim for attorney fees by the Plan against Montanile.

With regard to the third factor, an award of attorney fees against the Plan would send a clear message to ERISA fiduciaries holding subrogation or reimbursement claims: if you pursue plan participants for reimbursement when the governing plan documents give you no right to do so, you will pay the costs associated with the participant's defense of that litigation when and if a Court rules in favor of the participant. That is a message that needs to be sent to and received by plan fiduciaries in order to prevent harassment of participants.

With regard to the fourth factor, while the case is being defended only by Montanile on his own behalf, an award of fees to Montanile will have a beneficial effect on all plan participants who seek some protection against being pursued by plan fiduciaries for reimbursement despite the fact that no legal basis exists for these collection efforts. This case also involves an important legal issue that has not been dealt with in the Eleventh Circuit since Amara and McCutchen were decided: the extent to which ERISA plans can collect reimbursement based on SPD language when the governing plan documents are silent in establishing any right to reimbursement.

With regard to the fifth factor, the relative merits of the parties positions are outlined in the argument section in Point I above. Montanile believes this weighs strongly in his favor in this case.

In the event this Court grants Montanile's Motion for Summary Judgment he requests the opportunity to

present more specific information about the amount of attorney fees and costs he will have incurred at the time of the Court's ruling.

* * * [Certificate of Service omitted]* * *

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 12-cv-80746
Middlebrooks/Brannon

[Filed August 27, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 35-2]

DECLARATION OF BRIAN S. KING

I, BRIAN S. KING, make the following Declaration:

1. I am over 18 years of age, I am competent to make this Declaration and I have personal knowledge of the matters attested to.

2. I am one of the attorneys for the Defendant, Robert Montanile, in the above captioned matter and I am a member in good standing of the Utah State Bar. I have been admitted *pro hac vice* to proceed in this matter in the Southern District of Florida.

3. Robert Montanile ("Montanile") retained my law firm to assist him in connection with a claim for reimbursement ("subrogation claim") being asserted by the National Elevator Industry Health Benefits Plan ("the Plan") of benefits paid by the Plan for Montanile's medical care and treatment following an automobile accident in December of 2008.

4. After Montanile retained my office, counsel for the Plan, Kejo Bryan-Carby, and I exchanged a series of letters in which I requested information and documents to verify the validity of the subrogation claim.

11. The Plan rejected Montanile's counteroffer and provided a final counteroffer of its own. The Plan stated that failure to accept its final offer would result in litigation.

12. I wrote a letter to the Plan on January 6, 2012 and requested that if the Plan intended to litigate the matter, it do so within 14 days. I stated that I would release the funds to my client if I had not been served with the Plan's Complaint within that time frame.

13. The Plan did not respond to my letter. My office disbursed the funds to Montanile on February 2, 2012.

14. The next communication from the Plan to me or action taken by the Plan was when I was informed that the Plan had filed its Complaint in this case in July, 2012.

15. Montanile has paid me and incurred obligations to pay me on an hourly basis for my legal work in this case.

Under penalty of perjury, and pursuant to 28 U.S.C. § 1746, I swear that the foregoing is true and correct.

DATED this **27th** day of **August, 2013**.

/s/_____
Brian S. King
Attorney for Defendant Robert Montanile

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-80746-CIV
BRANNON

[Filed August 27, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,	)
Plaintiff,	)
v.	)
ROBERT MONTANILE,	)
Defendant.	)

[ECF No. 36]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, Board of Trustees of the National Elevator Industry Health Benefit Plan (hereafter, the "Board of Trustees"), and moves this Court for Summary Judgment in its favor and files this Memorandum of Law in support of its Motion for Summary Judgment.

UNDISPUTED MATERIAL FACTS

Plaintiff sets forth the following facts of the case which it believes are undisputed by the Parties, as acknowledged by Defendant's answer filed in this action (Document 11 in the Court's file):

1. The Board of Trustees is the named fiduciary and administrator of the National Elevator Industry Health Benefit Plan (hereafter, the "NEI Plan" or "Plan"), as defined in Sections 402(a) and 3(16)(A) of the Employee Retirement Income Security Act of 1974 (hereafter "ERISA"), (29 U.S.C. §§ 1102(a) and 1002(16)(A)). McGowan Affidavit Exhibit B, p. 83.

2. The NEI Plan is a self-funded, multiemployer, employee welfare benefit plan as defined by ERISA. Complaint ¶ 2, Answer ¶ 2.

3. The NEI Plan was established and is maintained in accordance with its Restated Agreement and Declaration of Trust (hereafter the "Trust Agreement") and is administered by the Board of Trustees at 19 Campus Boulevard, Newtown Square, Pennsylvania. Complaint ¶ 2, Answer ¶ 2.

4. Under the terms of the Trust Agreement, the Trustees are required to establish the Plan of Welfare Benefits (hereafter the "Plan of Benefits") which is the detailed basis on which payment of benefits is to be made pursuant to the Trust Agreement and which sets forth eligibility requirements, type, amount and duration of benefits that are to be provided to participants. McGowan Affidavit Exhibit A, Article

5. In accordance with this authority, the Board of Trustees has adopted and from time to time has

amended and restated the National Elevator Industry Health Benefit Plan Summary Plan Description, which is the Plan of Welfare Benefits authorized in the Trust Agreement. McGowan Affidavit ¶ 7

6. The Board of Trustees has drafted the Plan of Benefits so that it also comports to the statutory and regulatory requirements of a "summary plan description" as that term is defined in Section 102 of ERISA (29 U.S.C. § 1022) and 29 C.F.R. §2520.102. McGowan Affidavit ¶

7. All amendments, modifications and restatements of the National Elevator Industry Health Benefit Plan Summary Plan Description are approved by the Board of Trustees. McGowan Affidavit ¶ 7.

8. At all times relevant to this action, Defendant was a participant in the NEI Plan. Complaint ¶ 8, Answer ¶ 8.

9. On or about December 1, 2008, Defendant sustained personal injuries in an automobile accident. Complaint ¶ 9, Answer ¶ 9.

10. The NEI Plan has paid medical benefits of at least $121,044.02 to or on behalf of Defendant for treatment of injuries sustained in the December 1, 2008 accident. Complaint ¶ 10, Answer ¶ 10.

11. The Plan Benefits contains certain recovery/ reimbursement language as set forth in Exhibit A attached to Plaintiff's Complaint (pages 1 of 2 and 2 of 2 of Document 1-1 in Court's file). Complaint ¶ 12, Answer ¶ 12.

12. Defendant filed a negligence claim against driver causing the accident referenced in paragraph 7 above, as well as a claim for uninsured motorist benefits under his own automobile insurance coverage. Complaint ¶ 13, Answer ¶ 13.

13. Defendant has settled the claims referenced in paragraph 7 above for a total of $500,000. Complaint ¶ 14, Answer ¶ 14.

14. All or part of the proceeds realized from the settlement of the claims referenced in paragraph 10 above are within Defendant's actual or constructive possession. Complaint ¶ 15, Answer ¶ 15.

15. Defendant has not reimbursed the Plan from the proceeds of the settlement of the claims referenced in Paragraph 10 above. Complaint ¶ 16, Answer ¶ 16.

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-80746-CIV
BRANNON

[Filed August 27, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 36-1]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, JOHN A. MCGOWAN, under penalties for perjury, attest to the following facts as true and accurate and within the scope of my personal knowledge.

1. I am an adult over eighteen (18) years of age and am competent to testify as to the matters alleged herein.

2. I make this affidavit based on personal knowledge of all of the facts and allegations contained herein.

3. At all times relevant to this matter, I have been employed by the National Elevator Industry Benefit Plans as the Director of Health Claims Administration.

4. The National Elevator Industry Health Benefit Plan ("NEI Plan" or "Plan") was established by a Restated Amendment and Declaration of Trust ("Trust Agreement") which is attached hereto as Exhibit A.

5. Pursuant to Article VII of the Trust Agreement, the Trustees are required to establish the Plan of Welfare Benefits which, among other things, sets forth the detailed basis on which payment of benefits is to be made pursuant to the Trust Agreement.

6. Pursuant to Article VII of the Trust Agreement, the Trustees are granted full discretionary authority to adopt the Plan of Welfare Benefits setting forth the eligibility requirements, type, amount, and duration of benefits that are to be provided to eligible employees.

7. The Board of Trustees, pursuant to this authority, approved the current National Elevator Industry Health Benefit Plan Summary Plan Description as the Plan of Welfare Benefits governing the operation of the National Elevator Industry Welfare Plan at their regular meeting on September 8–9, 2004. The National Elevator Industry Health Benefit Plan Summary Plan Description is attached hereto as Exhibit B. Since adopting the latest National Elevator Industry Health Benefit Plan Summary Plan Description, the Trustees have adopted several

amendments to this document at regular meetings of the Board of Trustees in compliance with Article VII, Paragraph 3 and Article IV of the Trust Agreement.

8. The Board of Trustees intends and the Plan is administered so that the National Elevator Industry Health Benefit Plan Summary Plan Description serves as both the written plan and the summary plan description, and it is the formal plan document that sets forth the rights and benefits of Plan participants and their eligible dependents.

9. The National Elevator Industry Health Benefit Plan Summary Plan Description is the only document that sets forth eligibility requirements, type, amount and duration of benefits that are to be provided to participants and their eligible dependents.

10. The National Elevator Industry Health Benefit Plan Summary Plan Description contains an "Other Party Liability Claims" section that assigns the National Elevator Industry Health Benefit Plan a first right from the proceeds that a Covered Person receives from third party liable for their medical expenses. The Board of Trustees included this provision in this plan document to help preserve the assets of the NEI Plan.

11. In accordance with the National Elevator Industry Health Benefit Plan Summary Plan Description, Robert Montanile signed a written acknowledgement on August 5, 2009 acknowledging the Plan's right to recovery in accordance with the Plan's "Other Party Liability Claims" provisions which is attached hereto as Exhibit B.

12. In accordance with its fiduciary duty to enforce the terms of the NEI Plan and preserve finite

assets of the NEI Plan, the Trustees, through their agents, have requested Robert Montanile to reimburse the Plan for medical expenses paid on his behalf from the proceeds of his $500,000 settlement with third parties. To date, Robert Montanile has refused to honor his obligation under the NEI Plan.

FURTHER AFFIANT SAYETH NOT.

I AFFIRM UNDER THE PENALTIES FOR PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT.

Date: 8/27/2013 /s/_____
(Affiant's Signature)

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF Delaware)

Subscribed and SWORN to before me,
This 27th day of August, 2013.

/s/_____
NOTARY PUBLIC

My Commission expires: 1-27-14

[SEAL]

[ECF No. 36-4]

[pp.71-72]

Summary Plan Description / Coordination of Benefits (as of May 2011)

* * *

OTHER PARTY LIABILITY CLAIMS

The Plan's Right of Recovery

The Plan has the right to recover benefits advanced by the Plan to a covered person for expenses or losses caused by another party. If a covered person is injured or becomes ill under circumstances where another party is directly or indirectly liable for the illness or injury, the Plan is only obligated to provide covered benefits resulting from that illness or injury that exceed any amounts recovered from another party (whether or not the amount recovered is designated to cover medical expenses).

Amounts that have been recovered by a covered person from another party are assets of the Plan by virtue of the Plan's subrogation interest and are not distributable to any person or entity without the Plan's written release of its subrogation interest. However, amounts recovered by such covered person from another party in excess of benefits paid by the Plan are the separate property of such covered person. Unless otherwise noted in this SPD, amounts received from an individual health insurance policy for which the injured covered person or other family member has paid premiums are also the separate property of the covered person.

Amounts received from a personal homeowners insurance policy, an automobile insurance policy or a group insurance arrangement of any kind, regardless of whether the injured covered person or other family member has paid premiums, are considered a payment from another party and are subject to the Plan's right of recovery hereunder.

The Plan's right of recovery also applies if benefits are advanced by the Plan to an individual acting on behalf of an injured covered person or to the covered person's assignee.

The Plan's Right of Reimbursement

The Plan has a right to first reimbursement out of any recovery. Acceptance of benefits from the Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan due to the injury or illness and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person, and regardless of whether the covered person is made whole or recovers only part of his/her damages.

Acceptance of benefits from the Plan for an illness or injury by a covered person constitutes the covered person's agreement to file a claim for benefits against any party who is liable for the injury or illness to the covered person and to file claims under any and all applicable policies of insurance or self-insurance, including but not limited to homeowners insurance,

auto insurance, or any liability policy held for a public or commercial entity. The covered person must promptly file a claim for damages against any party liable and any such applicable policy and notify the Plan of his/her claim against such parties or policies or other recovery efforts. The covered person agrees that neither he/she nor anyone acting on his/her behalf will settle any claim relating to the injury or illness without the written consent of the Plan. The Plan reserves the right to make all decisions with respect to its rights of subrogation and recovery.

Acceptance of benefits from the Plan for an illness or injury by a covered person constitutes the covered person's agreement to assist the Plan in prosecuting any rights, interests, claims, or causes of action that have been assigned to the Plan against another party, including, if requested by the Plan, the institution of a legal proceeding against another party or any insurer or recipient of Plan assets improperly distributed without the written consent of the Plan.

Acceptance of benefits from the Plan for an illness or injury by a covered person constitutes authorization for the Plan to sue, compromise or settle, in the covered person's name or otherwise, all rights, claims, interests or causes of action to the extent of benefits advanced.

Acknowledgement Form

Prior to advancement of a benefit by the Plan to a covered person under this section for any expense or loss for which there may be a claim against another party, a covered person must execute a written document acknowledging the Plan's right of recovery as set forth in this section and must provide information

including the expense or loss for which another party may be liable and insurance coverage.

Failure to Execute Acknowledgement Form
Even if no Acknowledgement Form is sent by the Plan or sent but not signed, based solely upon the Plan's advancement of benefits, the Plan has a subrogation and reimbursement interest in the amount recovered, or to be recovered, by the covered person for the entire amount advanced by the Plan for the claim, even if the covered person does not execute the Acknowledgement Form. The covered person must promptly notify the Plan of any recovery from any source.

Claimant's Failure to Reimburse
Should it be necessary for the Plan to institute legal action against the covered person for failure to return Plan assets, in full, or to honor the Plan's interest in the amount recovered by the covered person from another party, the Plan may bring suit against the covered person and such covered person is liable for all of the Plan's costs of collection, including reasonable attorneys' fees and costs.

Right to Withhold Future Benefits
The Plan has the right to treat any benefits provided as an advance and to deduct such amounts from future benefits to which the covered person or an immediate covered family member may otherwise be entitled until the amount due the Plan has been satisfied. Such amounts may be deducted from amounts due third party medical providers despite any certification of Plan coverage that may have been provided to these providers.

Failure to Notify the Plan of Possible Other Party Liability

The Plan has all rights specified in this section in the event that a covered person fails to inform the Plan that another party may be Liable for the covered person's illness or injury and the Plan pays any benefits arising from that illness or injury.

Definition of "Party"

For purposes of this section "party" is defined to include, but is not limited to, any of the following:

- The party or parties that caused the illness, sickness or bodily injury;
- The insurer or other indemnifier of the party or parties who cause the illness, sickness or bodily injury;
- A guarantor of the party or parties who caused the illness, sickness or bodily injury;
- A worker's compensation insurer; and/or
- Any other person, entity, policy or plan that is liable or legally responsible in relation to the illness, sickness or bodily injury.

* * *

[ECF No. 36-5]

NATIONAL ELEVATOR INDUSTRY BENEFIT PLANS

19 CAMPUS BLVD., SUITE 200, NEWTOWN SQUARE, PA 19073-3288
TOLL FREE 1-800-252-4611
FAX 810-557-4655
WWW.NEIBENEFITS.ORG

REIMBURSEMENT AGREEMENT/WORKERS COMPENSATION CLAIMS ONLY

Name: *Robert J. Montanile*

Member ID: *NEI 801077495*

Date of Injury/Illness: *12-01-2008*

Has a Workers Compensation Claim been filed?
YES NO

If no, please explain: *Injured my neck and lower back*

Has your Workers Compensation Carrier accepted liability on your claim? YES NO
* *paid medicals denied weekly benefits*

If your Workers Compensation Claim was denied, have you filed an appeal? YES NO

As a covered member under the National Elevator Industry Health Benefit Plan ("Plan"), I acknowledge receipt of payment of expenses incurred as a result of a work related injury/illness as described above.

I hereby acknowledge the Subrogation provisions of the Plan's Summary Plan Description. In accordance with

Plan provisions, I agree to reimburse, in full, the National Elevator Industry Health Benefit Plan to the extent of any recovery for said expenses made by my Workers Compensation Carrier or as a result of any legal action or settlement or otherwise.

/s/ Robert J. Montanile (Signature of Employee) *8-5-09* (Date)

ACTION CANNOT BE TAKEN ON YOUR CLAIM(S) UNTIL ALL OF THE BELOW LISTED INFORMATION IS PROVIDED

1. Name of your Workers Compensation Carrier: *Gallagher Bassett*

   Claim Number: *011508022674WC01*

2. Workers Compensation Carrier Address: *1301 International Parkway #230, Sunrise, FL 33323*

3. Workers Compensation Carrier Telephone Number: *800-889-6764 – 954-846-1331 Debra Ribolini*

4. If your Workers Compensation Carrier denied your claim, or your claim is currently under review, please attach a copy of their determination.

   I had Judd Koenig as my attorney. As of 8-4-09, he is no longer my attorney. He can be reached at 561-626-3800

5. If you have filed an appeal with your Workers Compensation Carrier and you have retained an attorney to assist you with your appeal, please provide the attorney's name, address, and telephone number. If you have not retained an attorney to

assist you with your appeal, please indicate the same.

Please return this from with the supporting documents to the address listed above. Should you have any questions, please contact our Member Services Department at 1-800-252-4611.

PLEASE INCLUDE A COPY OF YOUR WORKERS COMPENSATION CARRIER'S DETERMINATION
COMPLETION OF THIS FORM DOES NOT GUARANTEE COVERAGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 12-CV-80746-DLB

[Filed September 13, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 38]

* * *

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff responds to the Defendant's Statement of Undisputed Material Facts as follows:

1. Plaintiff does not dispute the facts asserted in paragraphs 1 through 18 of the Defendant's Statement of Undisputed Material Facts.

2. Paragraph 19 of Defendant's Statement of Undisputed Material Facts does not state a factual allegation nor does it cite to the record. To the extent

that Paragraph 19 asserts a factual allegation, such allegation is neither undisputed nor material.

3. Paragraphs 20 and 21 of Defendant's Statement of Undisputed Material Facts appear to make only one allegation that attempts to quote language of the first paragraph of Exhibit A-1 and A-2 of the King Declaration (Docket Entry Nos. 35-3 and 35-4). With respect to the factual allegation, the Plaintiff disputes that the first paragraph of the Exhibit A-1 and A-2 contains the language cited in Paragraph 21. Such language is contained in Paragraph 1 of Article XVII (pg. 42) of Exhibit A-1 and A-2 of the King Declaration.

4. Plaintiff disputes Paragraph 22 of the Defendant's Statement of Undisputed Material Facts wherein it is indicated that nothing in the collective bargaining agreement ("CBA") addresses the right of subrogation or reimbursement. Paragraph 1 of Article XVII of the CBA adopts the language of the Health Benefit Plan and the Declaration of Trust into the CBA. The Health Benefit Plan contains rights of subrogation and reimbursement. *See* King Dec. Exhibit A-1 and A-2, p. 42 (Docket Entry Nos. 35-3 and 35-4); McGowan Affidavit Exhibit B-2, pp. 71-72 (Docket Entry No. 36-4).

5. Plaintiff does not dispute the facts asserted in Paragraph 23 of the Defendant's Statement of Undisputed Material Facts.

* * *

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 12-cv-80746
Middlebrooks/Brannon

[Filed September 25, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 39]

DEFENDANT ROBERT MONTANILE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Robert Montanile ("Montanile"), through his undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1(a), submits his Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

RESPONSE TO PLAINTIFF'S UNDISPUTED MATERIAL FACTS

Montanile does not object to Plaintiff's undisputed facts contained in paragraphs 1, 2, 8, 9, 10, 12, 13, and 15. As to the remaining statements, Montanile provides his responses below.

3. Montanile denies that the Restated Agreement and Declaration of Trust ("Trust Agreement") is the only document under which the Plan is established and operated. The "Bargaining Association Agreement," attached as Exhibit A to the first Declaration of Brian S. King (previously submitted) is also a document under which the Plan is established and operated.

4. Montanile denies that there is any reference in paragraph 4 to the Article in the Trust Agreement relied on by the Plaintiff and attached as Exhibit A to the McGowan Affidavit. The language of the Trust Agreement speaks for itself.

5. Montanile denies that the Trust Agreement is the only controlling Plan document and denies that the Summary Plan Description is the Plan of Welfare Benefits referenced in the Trust Agreement.

6. Montanile denies that the Plan of Benefits complies with the requirements of 29 U.S.C. §1022 and 29 C.F.R. §2520.102, and denies that the Plan of Benefits is a controlling Plan document.

7. Montanile denies that any minutes, records or other documents have been presented to reflect adoption by the Board of Trustees of the subrogation and reimbursement language contained in the Summary Plan Description. Montanile denies that

information has been presented to him or this Court that allows for verification that the process identified in the Trust Agreement has been followed in adopting any subrogation or reimbursement language.

8. The language of the document attached as Exhibit A to the Plaintiff's Complaint speaks for itself.

14. Montanile denies that he is in actual or constructive possession of any but a small portion of the proceeds realized from the settlement of his claims.

DEFENDANT'S ADDITIONAL UNDISPUTED FACTS

1. Montanile was involved in a serious automobile accident in 2008. He was at work and was driving a work vehicle when a drunk driver ran a stop sign and hit Montanile. Declaration of Robert Montanile ("Montanile Dec."), filed concurrently herewith, ¶2.

2. Montanile suffered severe neck and back injuries in the accident which resulted in his having an L4-5 fusion with hardware inserted in his back. Montanile Dec., ¶3.

3. Montanile continues to experience physical limitations and ongoing pain from his accident related injuries. *Id.*

4. Montanile was scheduled for an additional back fusion surgery in 2012, but had to postpone that procedure as a result of complications with his heart condition. Montanile Dec., ¶4.

5. Sometime after the accident, Montanile retained an attorney to assist him in pursuing

compensation for his accident related injuries. The claim was litigated and eventually settled for payment to Montanile on $500,000. Montanile Dec., ¶5.

6. Payment for attorney fees and costs, medical expenses, other out-of-pocket expenses, and satisfaction of liens was made from the settlement proceeds. The amount left from the settlement for Montanile was approximately $90,000. Montanile Dec., ¶6.

7. Montanile is a single parent of a twelve-year old daughter. He has been the sole caretaker and custodian of his daughter since she was one year old. Montanile Dec., ¶7.

8. Following the personal injury settlement, Montanile spent several months attempting to negotiate a settlement with the Plaintiff in this case. The Plaintiff had asserted a subrogation or reimbursement claim for amounts the Plan had paid to cover some of Montanile's medical expenses. Montanile Dec., ¶8.

9. Montanile retained counsel to assist him in connection with the reimbursement claim. Montanile's counsel wrote to the Plan's agent and requested information to demonstrate the Plan's compliance with the anti-inurement provisions of ERISA. Second Declaration of Brian S. King ("2nd King Dec."), ¶¶1, 2.

10. The Plan's agent responded to the request and provided some requested materials. However, neither the Plan nor its agent has, to date, provided any information to document the Plan's

compliance with ERISA's anti-inurement terms. 2nd King Dec., ¶3.

11. Montanile and the Plan were unable to come to an agreement regarding the reimbursement claim and Montanile gave the Plaintiff a deadline to either settle the claim or file suit. Montanile Dec., ¶8.

12. The Plaintiff did not take any action either before the deadline or for a number of months following the deadline. Montanile requested and authorized disbursal of the remaining funds from the settlement. Montanile Dec., ¶9.

13. Montanile has used most of the remaining settlement funds to support himself and his daughter and to maintain their home. Montanile Dec., ¶6.

14. Montanile was served with the Plaintiff's Complaint in July of 2012. Montanile Dec., ¶10.

ARGUMENT

I. The Language of the SPD on which the Plan Relies is Not Effective in Creating a Valid Right to Subrogation or Reimbursement

For the reasons outlined in Montanile's Opening Memorandum, docket #35, pp. 5-7, the language of the Summary Plan Description ("SPD") upon which the Plan relies is ineffective in creating an enforceable right to subrogation or reimbursement in the Plan. Montanile will not repeat those arguments.

Montanile acknowledges that ERISA plan fiduciaries may draft a document that operates both as

the governing plan document and the SPD mandated by ERISA at 29 U.S.C. §§1021 and 1022. But that is not what the Plan in this case did. Rather, the Plan created the rights and obligations of the parties in the two documents attached to the Affidavit of Brian S. King submitted with Montanile's Opening Memo, the Bargaining Association Agreement and the Restated Agreement and Declaration of Trust.[1]

The Plan argues that the language of Article VII of the Restated Agreement and Declaration of Trust gives the Trustees discretionary authority to " adopt a Plan of Welfare Benefits, which sets forth eligibility requirements, type, amount, and duration of benefits that are to be provided to eligible employees .." The Plan then asserts that the SPD is that "Plan of Welfare Benefits" identified in the Restated Agreement and Declaration of Trust.

The problem with this argument is two-fold. First, there is nothing to suggest that this "Plan of Welfare Benefits" referred to is, or may be, independent of the rights and obligations laid out in the Restated Agreement and Declaration of Trust and the Bargaining Association Agreement. Nor is there anything in either governing plan document to indicate that the SPD provided by the Plan to this Court is the "Plan of Welfare Benefits" referred to in Article VII of

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[1] The Plan attached only the Restated Agreement and Declaration of Trust to its materials submitted in support of its Motion for Summary Judgment. The Bargaining Association Agreement is also a document governing the Plan. It specifically references both itself and the Restated Agreement and Declaration of Trust as being the documents that govern the Plan.

the Restated Agreement and Declaration of Trust. The Affidavit of John McGowan states in conclusory fashion that the SPD is the "Plan of Welfare Benefits" referred to in Article VII. But missing from the McGowan Affidavit is any attachment showing that the Trustees ever took action to adopt the SPD. There are no minutes, notes, or other documents showing that the SPD generally or, more specifically, the subrogation provisions of the SPD, were ever reviewed, and voted on, by the Trustees. It is insufficient for the Plan to simply say to this Court or Montanile, "just trust us" with regard to the *process* by which the reimbursement and subrogation provisions in the SPD were adopted.

The second problem for the Plan also ties into the process by which the subrogation and reimbursement language was supposedly adopted. Article VII of the Restated Agreement and Declaration of Trust requires that the "Plan of Welfare Benefits" be " based on what it is actuarially determined to be within the financial limitations of the National Elevator Industry Welfare Plan .." Par. 3 of Article VII, titled "Written Plan of Benefits," goes into more detail. It requires that the "Plan of Welfare Benefits" be modified only " by a resolution adopted by majority vote of all members of the Board of Trustees, following advice by the Actuary selected by the Trustees that any such amendment is actuarially within the financial limitations of the National Elevator Industry Welfare Plan."

In its brief, the Plan recognizes the importance of providing an actuarial basis for the language of the subrogation and reimbursement provision in the SPD. It asserts in its Opening Memorandum, p. 6, that "reimbursement and subrogation provisions are crucial

to the financial viability of self-funded plans" and that "denying the Plan reimbursement would harm other plan members and beneficiaries by reducing funds available to pay those claims'" (citation omitted). However, the authority the Plan cites for this assertion is not any actuarial data provided to the Trustees to be considered by them as part of their deliberations about what provisions should be included in the "Plan of Welfare Benefits." Rather, the Plan cites only to case law to support its argument. But that is not what Article VII requires.

The Plan's reimbursement provision takes money out of the pockets of participants and beneficiaries. Although nothing in ERISA prohibits the Trustees from placing a subrogation or reimbursement provision into governing plan documents, Article VII requires that all participant benefits provided, as well as limitations on those benefits, must be "actuarially based" and approved by a majority of the members of all members of the Board of Trustees. No evidence exists before this Court that this process occurred for the alleged adoption of any reimbursement language by the Plan. In light of the degree to which the efforts of the Plan against Montanile will damage his own ability to provide for himself and his daughter, the Plan may not ignore the procedural and substantive requirement of Article VII. Montanile and this Court are entitled, and the Plan should be required, to verify that the Plan based its reimbursement provision on an actuarial foundation as opposed to providing a windfall to the Plan at the expense of injured Plan participants such as Montanile.

The Plan has made no effort to demonstrate that it is complying with the requirements of ERISA that prohibit any assets of the plan inuring to the benefit of any person or entity other than the Plan. 29 U.S.C. §§1103(c); 1104(a)(1)(A) and (a)(1)(D); 1106(a) and (b) reference this prohibition. As noted in Montanile's Statement of Additional Undisputed Facts, ¶¶9 and 10, during correspondence in the pre-litigation process, Montanile requested assurance about, and evidence of, the fact that the money the Plan was seeking as reimbursement from Montanile would inure only to the benefit of the Plan and not to any other party. The Plan never responded to Montanile. Likewise, the Plan makes no effort as part of its Motion for Summary Judgment to provide any information about the disposition of any funds it seeks from Montanile and how those funds will be accounted for actuarially. The Plan is not free to take money out of Montanile's pocket without identifying who will receive those funds and how they will be accounted for in terms of promoting the actuarial soundness of the Plan.

The Plan argues that Montanile's obligation to reimburse the Plan is established or strengthened by Montanile's signature on a document attached as Exhibit C to the McGowan Affidavit. But that document is irrelevant to this claim. By its terms it relates only to the proceeds from Montanile's workers' compensation claim. It is undisputed that the funds at issue in this case are from Montanile's personal injury case, not his workers' compensation claim. In any event, the Plan cannot create new rights and obligations between the parties based on an after-the-fact agreement for which there was no consideration given by the participant.

II. The Plan's Reimbursement Claim is not "Appropriate Equitable Relief" Under the Terms of 29 U.S.C. §1132(a)(3) and the Facts of this Case

Finally, under the circumstances of this case, to allow the Plan to obtain the reimbursement it seeks from Montanile is not "appropriate equitable relief" as referred to in 29 U.S.C. §1132(a)(3). Although U.S. Airways v. McCutchen, 133 S.Ct. 1537 (2013) indicates that ERISA plan fiduciaries may enforce the terms of plan documents relating to subrogation and reimbursement claims, the phrase "appropriate equitable relief" has meaning. This Court should relieve the burden on plan participants to reimburse an ERISA plan when the Plan engages in a course of conduct that calls for "appropriate equitable relief." Those facts exist in this case.

Montanile's recovery did not make him whole. Montanile Decl., ¶¶5 and 6. The Plan has expressed no willingness to share in the significant attorney fees Montanile incurred in obtaining the personal injury settlement. Montanile has very little of the personal injury proceeds remaining in his possession in light of the nature of his injuries and his financial needs. Montanile Decl., ¶¶5-7. And, despite the Plan's allegation that it has identified a particular fund distinct from Montanile's general assets, this is not the case. There is no separate and distinct fund to which the proceeds of the personal injury case can be traced as required by Sereboff v. Mid Atlantic Medical Services, Inc., 126 U.S. 1869, 1875 (2006).

Finally, the Plan's collection agent in the pre-litigation process failed to act responsibly and

promptly in protecting the reimbursement interests of the Plan. As noted in Montanile's statement of additional undisputed facts, ¶¶9 and 10, the Plan failed to provide information requested by Montanile's counsel in the pre-litigation process to verify that ERISA's anti-inurement provisions would not be violated by repayment of any reimbursement to the Plan. In addition, as outlined in the Declaration of Brian S. King, ¶s 4-14, the Plan had an opportunity to protect its reimbursement claim either by settling that claim or by filing suit against Montanile promptly after it became clear that the case could not be resolved. But the Plan did neither. It also failed to take any action to identify the funds, determine if they were separate and identifiable from Montanile's assets and ensure that they would not be distributed to Montanile. Under those circumstances, Montanile should be relieved of any obligation that may otherwise exist to reimburse the Plan.

CONCLUSION

For the reasons set forth in this Memorandum, the Plaintiff's Motion for Summary Judgment should be denied and Montanile's Motion for Summary Judgment should be granted.

DATED this 25th day of September, 2013.

s/ Brian S. King
Brian S. King
John V Tucker
Attorneys for Defendant Robert Montanile

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 12-cv-80746
Middlebrooks/Brannon

[Filed September 25, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 39-2]

SECOND DECLARATION OF BRIAN S. KING

I, BRIAN S. KING, make the following Declaration:

1. When I was originally retained by the Defendant, Robert Montanile, in this case, I wrote on June 6, 2011 to the agent for the Board of Trustees of the National Elevator Industry Health Benefit Plan ("the Plan"), Ms. Kejo Bryan-Carby. A copy of my June 6, 2011 letter to the Plan is attached hereto as Exhibit A.

2. In that letter, I requested that Ms. Bryan-Carby provide me with information demonstrating the

Plan's compliance with ERISA's anti-inurement provisions. Exhibit A, p. 3, ¶7.

3. Ms. Bryan-Carby responded to my letter and provided some information and documents as requested, but neither she nor the Plan has ever produced information or documents to provide proof of the Plan's compliance with ERISA;s anti-inurement terms.

Under penalty of perjury and pursuant to 28 U.S.C. § 1746, I swear that the foregoing is true and correct.

DATED this 25th day of September, 2013.

s/ Brian S. King
Brian S. King

* * * [First Exhibit A omitted] * * *

Exhibit A

Brian S. King
Attorney at Law

Brian S, King, Esq.
Via Certified Mail

336 South 300 East, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-1739
Toll Free: (866) 372-2322
Facsimile: (801) 532-1936
brian@briansking.com
www.erisa-claims.com

Linda A. Purdy, Paralegal
Mary E. Wardlaw, Paralegal

Via Certified Mail
Return Receipt Requested

June 6, 2011

Kejo Bryan-Carby
GIBSON & SHARPS
9390 Bunsen Parkway
Louisville, KY 40220

Re: Subrogation Claim of National Elevator Industry Health Benefit Plan
Insured: Robert Montanile

Dear Ms. Bryan-Carby:

I have been retained by Robert Montanile to assist in resolving the claimed subrogation interest of the National Elevator Industry Health Benefit Plan ("the Plan") against Mr. Montanile. I have reviewed some documents associated with the subrogation claim which have been provided to my office by Mr. Montanile and Robert Gordon, his personal injury attorney.

Before I am able to evaluate the ability of the Plan to assert any subrogation interest involving funds that may be paid to Mr. Montanile, I need to obtain additional information. Please provide to me the following information or documentation:

1. **Your authority:** I need documentation to verify the authority of any individual or entity acting on behalf of the Plan to assert the claim for subrogation and to collect amounts in connection with that claim from Mr. Montanile, I'm sure you understand why it would be inappropriate, perhaps a breach of fiduciary duty under 29 U.S.C. §1104(a), for me to facilitate the transfer of funds to anyone other than a plan fiduciary authorized to recover funds for the Plan. Only an ERISA fiduciary is authorized to bring a claim to impose an equitable lien or constructive trust on funds Mr. Montanile may recover from a third party. 29 U.S.C. §1132(a)(3). Please confirm in writing that you are a fiduciary within the meaning of 29 U.S.C. §1002(21). If you are not a fiduciary, please have the fiduciary who would be identified as the plaintiff in an action brought under 29 U.S.C., §1132(a)(3) for recovery of an equitable lien or constructive trust contact me. At the very least I need you to provide me with documentation from the fiduciary that clearly establishes your authority to act on behalf of the fiduciary. In addition, please provide me with all documents that provide a plan fiduciary with the authority to pursue a claim for subrogation or reimbursement on behalf of the Plan.

2. **Plan Documents**: Please provide me with the following plan documents:

    - The Summary Plan Description and other documents summarizing the rights and obligations of the parties under the Plan in effect for 2008, the year Mr. Montanile's accident occurred, to the present;

    - All documents under which the Plan was established;

    - All documents under which the Plan was operated from January 1, 2008, to the present. This includes any collective bargaining agreements, trust agreements, certificates of coverage, insurance policies or other documents which outline the rights and obligations of the parties at any time from January 1, 2008, to the present;

    - All contracts for administration or administrative services in connection with the processing, administration, claims handling, payment, or recoupment of payment associated with health benefits provided under the Plan in effect at any time from the date of Mr. Montanile's accident to the present;

    - All manuals, guidelines, policies, procedures, memoranda or other documents which the Plan, you, or any other fiduciary authored or relies upon relating to the handling of reimbursement or subrogation claims;

- All form 5500's, the annual reports, and any supplemental reports for the Plan, for all years from January 1, 2008, to the present;
- All contracts between the Plan and any entity insuring or indemnifying the Plan or any of its fiduciaries for any payments made by the Plan from January 1, 2008, to the present. The documents I request may be in the form of stop-loss insurance, excess loss insurance, reinsurance, certificates of coverage or any other contract, by whatever title, that provides insurance or reimbursement or indemnification for any portion of the Plan;
- To the extent there was any excess loss coverage, stop loss coverage, reinsurance, or other insurance coverage in place for any portion of the amounts paid by the Plan for any portion of the medical expenses incurred by Mr. Montanile for which the Plan asserts a reimbursement or subrogation claim, please provide an accounting of claims submitted and paid and a copy of any insurance policies.
- All insurance or other funding sources provided by or under the Plan for the benefit of Mr. Montanile from January 1, 2008.

3. **Identity of fiduciaries:** Please identify all named fiduciaries of the Plan along with their addresses, positions, and descriptions of their duties. Please also identify all unnamed fiduciaries (addresses, positions, descriptions of their duties) directly

involved in the processing, administration, claims handling, payment, or recoupment of payment associated with health benefits provided under the Plan from January 1, 2008, to the present.

4. **Documentation of payments:** Please provide a detailed statement of all monies paid on behalf of Mr. Montanile which you claim form any part of your claim for reimbursement, along with copies of all cancelled checks proving payment for those medical expenses.

5. **Contracts with health care providers:** Please provide copies of all contracts with health care providers under which the payments on behalf of my client was made, along with the statement and documentation regarding whether or not the plan received a rebate, discount, payback, or other benefit from any health care providers;

6. **Documentation of source of funds:** Please provide documentation and an explanation of the source of funds used by the Plan to make the payments that are the subject of your claim of reimbursement or subrogation including the identity of the insurer, organization, bank, or other entity holding the funds;

7. **Proof of compliance with ERISA's anti-inurement requirement:** As you are certainly aware, ERISA mandates that "the assets of a plan shall never inure to a benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and deferring reasonable expenses of administering the plan." 29

U.S.C. §1103(c). 29 U.S.C. §1104(a)(1) imposes the same limitation on the conduct of fiduciaries. Likewise, 29 U.S.C. §1106 strictly limits transactions for the use or benefit of a fiduciary or a party in interest. As such, please provide all documents setting forth the manner in which any funds which are recovered through subrogation or reimbursement claims are disposed of, including the identity of all individuals or entities who will receive any portion of those funds. Please also provide written assurance from all Plan fiduciaries that no portion of any recovered funds from Mr. Montanile will be used for any purpose other than to directly provide benefits to Plan participants and their beneficiaries.

The information and documents I have requested are necessary before we can engage in further dialogue regarding any potential reimbursement or subrogation claim the Plan may have. Each of the documents and pieces of information I have requested are essential to my ability to evaluate the basis of any subrogation or reimbursement interest the Plan may be asserting against Mr. Montanile. I will not be in a position to discuss this matter with you, or any other purported agent or fiduciary of the Plan, until and unless I receive the documents and information I have requested in this letter. If it is your position that you are not authorized, entitled or obligated to provide any portion of the information or documents requested in this letter, please identify the fiduciary or administrator to whom such requests should be directed within the next 20 days. Nothing in this letter should be read to constitute an agreement on behalf of

my client or myself that the Plan has a valid claim for reimbursement or subrogation.

The rights and remedies available to a Plan under ERISA are limited. Mr. Montanile reserves the right to raise any and all legal and equitable defenses available to him. These include laches, unclean hands, that no action may be brought to aid any enforcement of a forfeiture, and other equitable defenses. We also reserve the right to assert defenses based on the common fund doctrine and the made whole rule. As you are certainly aware, the Supreme Court in Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006), left open the question of whether the made whole rule must be taken into account in evaluating what is "appropriate equitable relief" authorized under 29 U.S.C. §1132(a)(3). Sereboff, 547 U.S. at 368, fn. 2.

I look forward to your prompt response to my questions.

Sincerely,

Brian S. King

BSK:lp

cc: Robert Montanile
Robert Gordon via email
(rgordon@fortheinjured.com)

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 12-cv-80746
Middlebrooks/Brannon

[Filed September 25, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 39-3]

DECLARATION OF ROBERT MONTANILE

I, Robert Montanile, make the following Declaration:

1. I am the named Defendant in the above captioned matter.

2. In December, 2008, I was involved in a serious automobile accident in which I was hit by a drunk driver after he ran a stop sign. At the time of the accident, I was at work and was driving a work vehicle.

3. As a result of the accident, I had severe neck and low back injuries that led to an L4-5

fusion with hardware being placed in my back. I continue to have limitations and back pain. I have been given a permanent partial impairment rating of 25%.

4. My physician has recommended ongoing medical care in connection with my accident related injuries, including an additional fusion which was originally scheduled for 2012. That back surgery had to be postponed because of complications I was experiencing with a co-morbid heart condition.

5. Following the accident, I retained the services of a personal injury attorney to assist me in obtaining compensation for my injuries. I ultimately settled the case for payment of $500,000 after many months of litigation. Attached hereto as Exhibit A is a summary of the proceeds of the settlement and how they were disbursed. The amount recovered was not sufficient to compensate me for past and future medical expenses, past and future lost wages, losses associated with other out-of-pocket expenses, or compensation for my intangible losses.

6. After payment of attorney fees and costs, satisfaction of liens, medical expenses, and other expenses, the amount remaining from the settlement as compensation for my injuries was approximately $90,000. Most of that amount has been spent since the time of the settlement in supporting myself and my daughter and in maintaining our home.

7. I am the custodial single parent for my 12-year old daughter. I have been solely responsible for raising and supporting my daughter since she was one year old.

8. I spent several months following the settlement of my personal injury claim trying to negotiate a resolution of the reimbursement claim asserted by the Plaintiff, my former employer. I eventually set a deadline for the Plaintiff to either accept any amount I had offered to settle the claim or, in the alternative, to bring suit to enforce the reimbursement claim to allow me an opportunity to present to the Court my arguments about why I did not believe the Plaintiff was entitled to reimbursement under the terms of the Plan.

9. The deadline passed with no action from the Plaintiff and I authorized and requested distribution of the remaining funds by my attorneys.

10. Several months after the funds had been disbursed, I was served with the Plaintiff's Complaint.

Under penalty of perjury and pursuant to 28 U.S.C. § 1746, I swear that the foregoing is true and correct.

DATED this 24 day of September, 2013.

/s/
Robert Montanile

Exhibit A

Disbursement to: Robert Montanile		
Gross Proceeds from Negotiated Settlement:		$500,000.00
Less: Attorneys' fees in accordance with fee agreement-40%		
Lynn Waxman, Esq. (5%)	$25,000.00	
Gordon & Doner, P.A. (35%)	$175,000.00	
		($200,000.00)
Net Cash Proceeds before costs advanced:		$300,000.00
Less: Medical expenses:		($1,213.22)
Anesthesiology of Jupiter	$465.22	
West Palm Beach Fire Rescue	$398.00	
Mid Town Imaging	$416.89	
Life Watch	$300.00	
	Subtotal:	$298,786.78

Less Liens:		($146,189.02)
Blue Cross Blue Shield/Health Care Lien	$108,607.07	
Gallagher Bassett/ Workers Compensation Lien Balance of $28,296,00-Waived	$0.00	
Patrick & Peggy O'Hara	$10,360.00	
Joan Laurito	$11,000.00	
Funds R Us Loan Balance of $20,000.00 reduced to	$14,000.00	
State of CT /Child Support Lien	$1,325.55	
Union Dues	$896.40	
	Subtotal:	**$152,597.76**
Less: Client Costs Advanced: (See Attached) Balance of $69,797.54 reduced to		($63,788.48)
	Subtotal:	$88,809.28
Funds advanced to client on April 29, 2011		$58,884.39

Funds advanced to client on July 1, 2011		$1,628.89
Final Funds Available to Client:	$28,296.00	

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 12-cv-80746
Middlebrooks/Brannon

[Filed October 9, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 40]

DEFENDANT ROBERT MONTANILE'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Defendant Robert Montanile ("Rob"), through his undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, submits the following Reply Memorandum in Support of his Motion for Summary Judgment in the above captioned matter.

ARGUMENT

Montanile's arguments regarding the fact that the governing plan documents do not contain language giving the Plan any subrogation or reimbursement

rights are outlined in Montanile's Opening Memorandum, docket #35, pp. 5-7, and Opposition Memorandum, docket #39, 4-8. Montanile will not repeat them here. However, the Plan's arguments do not refute Montanile's points.

The Plan argues that because the Restated Agreement and Declaration of Trust ("Trust Agreement") and the Bargaining Association Agreement do not flesh out all the details of the health benefit plan, the Summary Plan Description ("SPD") on which the Plan relies must govern the relationship. If the Trust Agreement and Bargaining Association Agreement were clear that the SPD would stand alone, perhaps the Plan's argument would hold water. But, in fact, the Trust Agreement does not contemplate the SPD to play such a role.

The Trust Agreement specifically refers to a "Plan of Welfare Benefits" that will be formulated by the parties. The Plan has never identified or produced this document. Either there is a document that exists but has not yet been produced by the Plan or, more likely, the Plan failed to adhere to the terminology used in the Trust Agreement and has simply utilized the SPD as the *de facto* "Plan of Welfare Benefits." The Plan goes on in its Opposition Memo to assert that because the SPD has all the components required of ERISA, it must be both the governing plan document as well as the SPD.

The problem for the Plan is that the Trust Agreement and the Bargaining Association Agreement contemplate more than the SPD, however it is denominated, to stand alone in establishing and defining the parties' rights and obligations. The Trust

Agreement, Article VII, Par. 1, states that the benefit plan must be "based on what it is actuarially determined to be within the financial limitations of the National Elevator Industry Welfare Plan." Par. 3 of Article VII goes on to require that any amendments to that benefit plan must likewise be " actuarially within the financial limitations of the National Elevator Industry Welfare Plan," must follow advice by "the Actuary selected by the Trustees," and must be adopted by a resolution approved by a majority of all the members of the Board of Trustees. No evidence that this occurred has ever been produced by the Plan.

The requirements in Article VII for benefits being based on actuarial principles is critical in this case because it is well established that any funds that may be recovered by the Plan must be used to fund plan benefits or the reasonable costs of administering the plan. 29 U.S.C. §§1103(c); 1104(a)(1)(A) and (a)(1)(D); 1106(a) and (b). These anti-inurement provisions of ERISA are in place to ensure that the assets of the plan are used for the benefit of the plan participants and beneficiaries. They work hand-in-glove with the actuarial requirements established in Article VII.

Both the anti-inurement and actuarial issues are critical in this case because it is well established that reimbursement of the type the Plan seeks in this case are simply windfalls. They are generally not actuarially accounted for in the establishment and quantity of health benefits. Edwin W. Patterson, *Essentials of Insurance Law*, § 33 (2d ed. 1957). Professor Patterson stated, "Subrogation is a windfall to the insurer. It plays no part in rate schedules." *Id.* at 151-52. *See also* Frost v. Porter Leasing Corp., 436 N.E.2d 387 390

(Mass. 1982) (denying subrogation by health insurer, stating "Subrogation played no part in the bargain between insurer and insured."); Maxwell v. Allstate Ins. Co., 728 P.2d 812, 815 (Nev. 1986) (denying subrogation on personally injury claim, stating "Allowing subrogation deprives the insured of the coverage for which he had paid and results in a windfall recovery for the insurer."); Kristin L. Huffaker, *Where the Windfall Falls Short: "Appropriate Equitable Relief" After* Sereboff, 61 Okla.L.Rev. 233, 248-49 (2008) ("Insurers consistently apply such recoveries to increasing dividends to shareholders."); Scott M. Aranson, *ERISA's Equitable Illusion: The Unjustice of Section 502(a)(3)*, 9 Emp.Rights& Emp.PolicyJ. 247, 289 ("Subrogation recoveries are used to increase executive compensation or shareholder dividends, not to decrease premiums."). Absent proof by the Plan that the ability to obtain the reimbursement it seeks in this case was part of the Plan's actuarial calculations in establishing benefits, the actuarial requirements of the language of Article VII dictate that the Plan's claim must fail.

At the very least the Plan must demonstrate that any recovery it obtains from Montanile will not run afoul of ERISA's anti-inurement provisions. Despite Montanile's repeated requests for this information in both the pre-litigation appeal process and in litigation, the Plan has never produced any information about the disposition of the funds it seeks from Montanile. This is not surprising in light of the fact that the most likely effect of collecting subrogation money will simply be to reduce the contribution from the employers that make up the Plan. That would be a violation of the anti-inurement provisions of ERISA and likely explains

why the Plan has never produced the repeatedly requested information about disposition of the reimbursement money. While U.S. Airways v. McCutchen, 133 S.Ct. 1537, 1547 (2013) holds that ordinarily the plan document language controls over equitable principles, nothing in McCutchen holds that the Plan may override ERISA's anti-inurement provisions. And, of course, logic dictates such a conclusion would gut the protections that Congress intended that statute would provide to participants and beneficiaries. The Plan's silence about the ultimate disposition of the funds it seeks from Montanile precludes its ability to collect those funds.

In short, the Plan may not recover anything from Montanile until and unless it provides assurances about the disposition of the money it seeks. Montanile asked for that information from the Plan before the funds held by his attorney were distributed to him. However, the Plan ignored Montanile and his counsel. Having stonewalled in the pre-litigation process, the Plan cannot belatedly come to this Court and provide that information. Montanile and his counsel relied on the Plan's failure to provide this information when they made the decision to disburse the funds out of Montanile's attorney's trust account. The Plan's time to provide assurances to Montanile that its reimbursement claim complied with ERISA's requirements came and went. The Plan now seeks something beyond "appropriate equitable relief" under 29 U.S.C. §1132(a)(3).

The plan relies on Alday v. Container Corp. of America, 906 F.2d 660 (11th Cir. 1990), and Ozarks Coco-Cola/Dr. Pepper Bottling Co., v. Ritter, 2011 U.S.

Dist. LEXIS 66686 (W.D. Mo. 2011) to support its argument that the SPD stands alone to establish the rights and liabilities of the parties in this case. But they are of no help to the Plan. In those cases the SPD was the only document that established plan terms. " [T]here is no need to refer to other communications between the parties to determine the parties' intent" Alday, 906 F.2d at 666; ". the SPD was the only document establishing the terms of the plan" Ozarks, at *7. That is not true in this case. The terms of the Trust Agreement are critical to determining the parties' intent and their rights and obligations. ERISA clearly requires the existence of not only an SPD, but a master plan document or documents from which information is drawn and summarized in creating the SPD. The Ninth Circuit held in Cline v. The Industrial Maintenance Engineering & Contracting Co., 200 F.3d 1223 (9th Cir. 2000) that the fact that the plan does not have a master plan document does not excuse it from the necessity of creating one when that document is requested by a plan participant.

> [i]f any of these documents do not exist at the time of a request, it is consistent with the aims of ERISA to impose a penalty on the plan administrator [because t]here is nothing keeping the administrator from preparing a mandatory document where none previously existed and it is his burden upon threat of penalty to do so.

Id, at 1234 (9th Cir. 2000), citing Jackson v. E.J. Brach Corp., 937 F.Supp. 735, 740, n. 6 (N.D.Ill. 1996).

Ozarks does identify information critical to the success of the plan's reimbursement argument in that

case that the Plan in this case has never produced. In Ozarks the plan fiduciary submitted evidence that the recovered funds would be deposited into that welfare benefit plan's trust account, would be available to pay medical expenses, and that the only use of the reimbursed funds was to fund the welfare benefit plan. Ozarks, at *16. That case supports Montanile's argument about the importance of the Plan providing to him and to this Court information that satisfies the requirements of ERISA's anti-inurement provision.

Ozarks also makes clear that the Plan's reimbursement claim against Montanile is valid only insofar as the Plan can target specifically identifiable funds in Montanile's possession that are attributable to the third party recovery. Ozarks, at *5-6. The Plan in this case could have identified, and placed an equitable lien against, specific funds that represented the money Montanile recovered from his personal injury claim if the Plan had acted in a timely way to secure its lien. But once those funds were disbursed after the Plan failed to act in a timely way to protect its interests, the Plan lost its ability to identify segregated, identifiable funds. With that loss goes the ability of the Plan to be reimbursed.

CONCLUSION

Under both the language of the plan documents and under the "appropriate equitable relief" language of 29 U.S.C. §1132(a)(3), the Plan's reimbursement claim must fail. It has not demonstrated that its SPD is the "Plan of Welfare Benefits" contemplated and referred to in the governing plan documents. It has also not shown that its reimbursement and subrogation language was formulated and adopted based on the

actuarial principles the Trust Agreement requires. It has never demonstrated that the disposition of the money it seeks from Montanile will not violate ERISA's anti-inurement provisions. Finally, it is self evident that to allow the Plan to obtain funds from Montanile after it failed and refused to provide Montanile assurance that its disposition of the funds would not violate ERISA would be going beyond the range of "appropriate equitable relief" that ERISA references as being the limits on the remedy to which the Plan is entitled. For all these reasons, the Plan's reimbursement claim must fail and this Court should grant Montanile's Motion for Summary Judgment.

DATED this 9th day of October, 2013.

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* * * [Certificate of Service omitted]* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-CV-80746-DLB

[Filed October 9, 2013]

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

[ECF No. 41]

* * *

PLAINTIFF'S RESPONSE TO DEFENDANT'S ADDITIONAL STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff responds to the Defendant's Statement of Undisputed Material Facts as follows:

1. Plaintiff does not dispute the facts asserted in paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 11, 12, and 14 of the Defendant's Statement of Additional Undisputed Material Facts.

2. With respect to Paragraphs 3 and 13, the Defendant's statement that he only received

"approximately $90,000" is not supported by the Disbursement of Settlement Sheet. Declaration of Robert Montanile, Exhibit A. The Disbursement of Settlement Sheet shows $108,607.07 allocated to the "Blue Cross Blue Shield/Healthcare Lien" Blue Cross Blue Shield of Illinois is the third party claims administrator of the National Elevator Industry Employee Benefit Plan. The Disbursement Sheet shows that $108,607.07 was originally withheld from the settlement proceeds to address the Plaintiff's reimbursement claim. In addition to these funds, an additional $88,809.28 was left for disbursement to Mr. Montanile. Either Mr. Montanile received significantly more than $90,000 from the settlement, or Mr. Montanile's counsel still holds $108,607.07 in trust on his behalf.

3. With respect to Paragraph 10, the Plaintiff disputes that Plaintiff's answer to Defendant's counsel's request did not demonstrate compliance with ERISA's anti-inurement terms.

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